

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS

757

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23566, 23567

UNITED STATES OF AMERICA,
Appellee

v.

MARVIN J. BODDIE

and

DOIA T. LAWSON,

Appellants

Appeal from the United States

District Court for the District of Columbia
United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 9 1970

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STATEMENT OF THE QUESTION PRESENTED

The question is whether the District Court erred, under the circumstances of these cases, in permitting the impeachment of each Appellant by proof of a prior conviction.

These cases have not been previously before this Court under the same or a similar title.

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JURISDICTIONAL STATEMENT

The Appellants, Marvin J. Boddie and Doia T. Lawson, were each indicted on one count of burglary in the second degree (22 D.C. Code § 1801(b)), and on one count of grand larceny (22 D. C. Code §2201). The cases were tried before a jury, the Honorable William B. Jones, United States District Judge, presiding. Following a verdict of guilty as to each Appellant, on each count, the Appellants were sentenced, respectively, to four-

to-twelve years on the burglary-in-the-second-degree count. and three-to-ten years on the grand larceny count. The District Judge directed that the sentences were to run concurrently, as to each other, but consecutively as to any sentence imposed prior to this date by any court in this or any other jurisdiction, State or Federal."

REFERENCES TO RULINGS

None.

STATEMENT OF THE CASE

The Emerson Institute, a private college-preparatory school founded in 1852, is located at 1324 18th Street, Northwest, between Massachusetts and Connecticut Avenues, in the City of Washington. Originally, the Institute comprised three street addresses, viz., 1322, 1324 and 1326 18th Street. These three buildings are now joined together internally (Transcript of Testimony, pp. 8-10). Principal access to the Institute is through the main entrance at the 1324 18th Street address. The rear of the buildings is guarded with a security fence, which has a gate which is kept padlocked and chained except when school is in session. On the north side of 18th Street the Institute is contiguous with a public parking lot. On the south side, toward Connecticut Avenue, is another parking

lot owned by the National Bank of Washington. [A sketch of the area drawn by Mr. John J. Humphrey, the Dean of the Institute, who appeared as a witness for the Government, is designated Government's Exhibit No. 1.]

William P. Garrity, Esq., a member of the Bar of the District of Columbia, resided, on February 10, 1969, at 1331 18th Street, Northwest. Mr. Garrity occupied an apartment on the fourth floor of this building. Directly across the street from Mr. Garrity's residence is the 18th Street parking lot owned by the National Bank of Washington; next to this parking lot is the Emerson Institute (Tr. 38-40).

Just after midnight on February 10, 1969, Mr. Garrity, who was at home in bed, heard a crash of glass, followed by a tinkle of glass, whereupon he arose and looked out of a window in his living room, i.e., down onto 18th Street (Tr. 40). He "observed two gentlemen there". One of these men was in the center building of the Emerson Institute, and the second one was "crossing away from the Emerson Institute to my side of the street." The witness described the dress of the two men as follows (Tr. 41):

"One gentleman was dressed in a dark raincoat type. He appeared to have on dark trousers. The other gentleman was dressed in a light tan type raincoat with a rather bright, or strong, color, blue trousers."

Thereupon, Mr. Garrity went downstairs to the apartment of his friend and neighbor, Geoffrey M. Alprin, Esq., who is also a member of the Bar of the District of Columbia, and who resided in a third-floor apartment directly beneath that of Mr. Garrity (Tr. 40). Mr. Garrity told Mr. Alprin that "I thought something was occurring across the street and he said, 'Yes, and I'll call the police.'" (Tr. 41). Mr. Garrity then ran back upstairs, and, standing in his apartment with his head out of the window (Tr. 41):

* * I observed the gentleman in the dark coat walking on the east side of Eighteenth street, up towards Massachusetts, and then returning. * * That's the side of my house [i.e., on the same side of the street as the witness's residence]. * * I then returned to the Alprin apartment to see if he had called the police and he said 'Yes'. And then we returned up to my apartment and looked out the window and saw the gentleman leave and then he went across to the other side, which would be the west side, and the police came at that time."

When the individual thus referred to by Mr. Garrity was apprehended shortly thereafter, he was walking south on the west side of 18th Street, and was stopped by the police at a point "about directly across from [Mr. Garrity's] house, which is in front of the parking lot."

The man thus described by Mr. Garrity as "the gentleman in the dark coat" was seen by the witness, before he crossed the street to Mr. Garrity's side, to say something "to the other gentleman. And this called my attention to

the gentleman at the door of the center building of the Emerson Institute' (Tr. 43). This second individual was outside the door to the main entrance to the Institute. This was the man in the "blue trousers and the tan raincoat.

(For the convenience of the Court. it might be noted that the individual referred to in the Transcript of Testimony as "the gentleman in the dark coat" turned out to be the Appellant Boddie the individual referred to as the gentleman in the blue trousers and tan raincoat", the Appellant Lawson.)

With regard to the man walking on 18th Street, Mr. Garrity saw "a policeman come up to him and then I ran downstairs". Then (Tr. 43):

"Q. You see that man who was wearing the dark coat here today?

A. I couldn't identify him.

Q. Now, what happened to the man in the tan raincoat and the blue trousers?

A. Well, at the time when the police apprehended the gentleman in the dark coat, then I came down the stairs, there was no one else except the police on the street. I was standing in front of my house more or less with Mr. Alprin for a short period of time. Mr. Alprin said, 'It is cold. I am going upstairs to get my coat.' While he was gone, I was standing watching the police. The gentleman in the tan coat came over the fence, from what must be the garden in the back yard of the Emerson Institute, into the parking lot of the bank; walked across the parking lot and climbed the gate of the bank and during this period of time, I called the police's attention to this gentleman.

Q. What was he wearing?

A. He was wearing a tan raincoat, a light tan raincoat, and rather strong -- blue trousers of a rather strong shade.

Q. Did you hear or see anything before you saw him climb over the fence?

A. I heard a tinkle of glass.

Q. How long after you heard that tinkle of glass, did you see the man?

A. A short period of time. I couldn't say within the minute. I would guess -- I haven't much concept of time -- I'm not sure.

Q. Do you see anyone here today like that man?

A. I can't identify the two gentlemen. One was of taller stature and the other was a little shorter. That's all. * *

Q. Did you see the man in the tan coat taken into custody?

A. Yes.

The testimony of Geoffrey M. Alprin, Esq., was corroborative of the testimony of Mr. Garrity.

Between 12:30 and 1:00 a.m. on the morning of February 10, 1969, Mr. Alprin heard "a crash of glass which came, I thought, from across Eighteenth Street." The witness looked out of his window, diagonally across the street to the Emerson Institute. On the near side of 18th Street, he saw a man "who was walking along the sidewalk, back and forth on the sidewalk, directly in front of the Emerson Institute, but on my side of the street * * (Tr. 60).

This individual went across the street to the middle entrance of the Emerson Institute [and] up the stairs. * * Then he came back to my side of the street and again started walking up and down * * .

After calling the police, Mr. Alorin ran upstairs with his friend, Mr. Garrity, and (Tr. 61, et. seq.):

We again observed this kind of activity, and the police came in a few minutes -- two or three minutes. As they came, I ran downstairs to tell them what was going on -- what I thought was going on and I think that as I got out of the entrance to my apartment house, one policeman * * was bringing a man back toward the entrance to my apartment, which was 1331 Eighteenth. * *

Q. And did you observe them approach a subject you were watching?

A. No. I saw the [police] car come and then I ran downstairs, and when I got downstairs -- that must have taken twenty seconds or something like that -- when I got downstairs, the car apparently had stopped. They had gotten out and picked up the man that was on my side of the street at that time. * *

Q. And at that time, were there any other persons besides the two police officers and the gentleman they had between them on the street?

A. No, sir, not as I remember. I don't believe so.

Q. And did the police officer bring this man up to where you were standing?

A. Yes. * *

Q. And at that point, did they ask you to identify this man?

A. Not in those words. I knew you were going to ask me that question. I don't really know

what they said. I said within the next few seconds, 'That's the man I called about,' or something like that. I don't remember what their question was.

Q. So in other words, you did point him out though?

A. Yes, sir. At that time, or about at that time. * *

THE COURT. I think we had better see if he can see the man in the courtroom today that he saw arrested. See if he can identify the man he saw. * *

Q. Can you identify the man? Do you see him?

A. Yes, sir, I believe I can. He's the man on the end of the table. * *

THE COURT: The record will show that the witness identified the defendant Boddie." (Tr. 67)

The Government then produced two Officers of the Metropolitan Police Department. The first, Officer Gary J. Galle, testified that on the night in question he received a radio run for a breaking at 1324 18th Street, Northwest, to which he and his partner, Officer Alan F. Herbert, responded in their cruiser. The run reported that "There is someone believed to be breaking into 1324 Eighteenth street and there's a lookout in front, possibly" (Tr. 74). When approximately a half-block from the Institute, Officer Galle saw a subject standing in front of the premises. There was no one else on the street at that time. The subject could not produce any identification and "couldn't

give a very good account of himself" (Tr. 76). He was wearing a brown trench-coat. Then (Tr. 76-77):

"As I was questioning him, Mr. Alprin evidently came downstairs from his apartment across the street and yelled across the street to me that he was the person who had called the police and that the gentleman that I was talking to was the same individual that he had seen going up and down the steps of the Emerson Institute and walked up and down the street in front of his apartment. He told the dispatcher he thought maybe there was a lookout. * *

Q. After this conversation between you and Mr. Alprin, what did you do with him then? That is the defendant, the suspect that you picked up?

A. I spoke to him again and asked him what he was doing in the area. Since he didn't have any identification and he couldn't give a good account of himself, I placed him under arrest."

Officer Galle then made an in-court identification of the Appellant Boddie. (Tr. 78).

Officer Alan F. Herbert, MPD (Tr. 113-152), accompanied his brother Officer to the scene. He saw a man standing in front of the Emerson Institute (Tr. 115). When this individual saw the police cruiser coming, he started walking rapidly south on 18th Street, on the west side of the street. Officer Herbert identified this man in his testimony as the Appellant Boddie (Tr. 116-117). Then (Tr. 118-121):

* * * Do you recall why your attention was directed to this particular individual?

A. * * After I alighted from the scout car, my partner [i.e., Officer Galle] stayed with the one gentleman there with his hand on the table. I went to the front of the Emerson Institute and saw that the glass was broken out of the door and there was an adding machine outside on the stoop. Inside, the glass was broken out of the office and there was a typewriter sitting in there. I yelled to my --

Q. Where was the typewriter sitting?

A. In the hallway.

Q. On the floor?

A. Yes, sir. And I yelled to my partner that the premises had been broken into and to hold the subject that he was talking to; and at that time, he brought him back to the front of the Institute and we were all in front; and one of the gentlemen standing down in front of this apartment [i.e., either Mr. Garrity or Mr. Alprin] got my attention and yelled to me that someone was climbing over the fence in the rear, which, from where I was, I could not see the fence.

So, by the time I started south on Eighteenth Street, I saw this subject climb over the fence from the bank parking lot onto the sidewalk. I stopped him then and asked him what he had been doing.

Q. Officer, what was he wearing?

A. He was wearing the light trench coat and blue pants. * *

Q. Officer, do you see in court here now a man who was arrested by your partner?

A. Yes, sir, I do. * *

THE COURT. * * The record will show that the witness has identified the defendant; that is, the defendant Lawson."

Officer Herbert then testified that he had been assigned, prior to this trial, as the physical evidence

officer of the Third Precinct, for which he had had three weeks of special training (Tr. 122). He gathered debris at the scene of the crime, taking paint samples from the door of the office that had been entered, where the wood had been shattered, and glass samples from the floor outside the doors as well as from the broken rear window (Tr. 122-123). This material constituted Government's Exhibits Nos. 4-9, and, together with the clothing worn by the Appellants on the date of their apprehension, designated as Government's Exhibits Nos. 11-16, and a glove found on the premises, was sent to the FBI crime laboratory in Washington (Tr. 146).

Also produced as witnesses by the Government were two Special Agents from the crime detection laboratory of the Federal Bureau of Investigation in Washington. The first, Mr. Richard W. Flach, was a "geologist, botanist and microscopist" (Transcript of June 26, 1969, p. 11 et seq.), with over 25 years' experience in this field. On February 11, 1969, Officer Galle delivered to him the Appellants' clothing, and the specimens of paint and glass taken from the Emerson Institute. After receipt of this material, the clothing was cleaned in the laboratory, and the debris which was recovered from it was placed in "pill boxes". Mr. Flach's duty was to examine the debris for the presence of any glass particles which I might be

able to associate with the specimens of glass that I had", after which he gave the boxes of debris to another Special Agent of the laboratory so that an analysis of the paint could be made.

Mr. Flach examined the glass specimens which he was given, and the debris from the Appellants' clothing, but, in sum, could not connect the two. Particles of glass were found in the shoes of each Appellant, but it did not match the glass taken from the premises of the Institute by Officer Herbert (Tr. 19). Moreover, no glass was found on Appellants' clothing, or on the gloves (Tr. 22).

Special Agent Charles E. Calfee was then called by the Government. This gentleman is a spectrographer in the Bureau's crime laboratory. His function is to examine materials for purposes of comparison, or to determine their composition. In the course of this activity the laboratory uses various scientific instruments (Tr. 27), including the gas chromatograph (Tr. 30). Mr. Calfee received the paint samples from Mr. Flach, and examined them. A microscopic examination of the paint particles contained in one "pill box", i.e., a box of debris taken from the clothing, established that these particles exhibited four layers similar to the top four layers of the paint particles taken from the premises (Tr. 32). In short, the paint particles

retrieved from Appellant Lawson's shoes and top coat, and from the gloves of Appellant Boddie, was similar to paint particles obtained at the Emerson Institute by Officer Herbert (Tr. 31-34).

The Appellants then took the stand.

Appellant Marvin J. Boddie, on the date in question, resided at 1325 O Street, Northwest. Earlier that evening, he had come with a friend to a party at another friend's house (Tr. 240). Shortly after midnight, Appellant decided that he was hungry, and went to a carry-out shop on Connecticut Avenue, near Dupont Circle, where he ate a sandwich and drank a "coke". He then started back, going around Dupont Circle, on to Massachusetts Avenue, and down 18th Street. As he progressed on 18th, he saw a man, with a lighter-colored coat than his, and a Russian-type hat, "jumping over the fence of the Emerson Institute" into the adjoining parking lot (Tr. 243). Appellant then "just kept on. I'd say I got about two doors, and then is when the officer pulled up and stopped me and started questioning me." He told, or tried to tell, the police where he had been. They did not take him back to the restaurant to try to confirm his story. Prior to being put into the wagon with him, he had never seen the Appellant Lawson before. He did not plan or participate in a burglary of the Emerson Institute (Tr. 251). Cross-

examination of Appellant Boddie developed nothing material except this (Tr. 258-259).

Q. Mr. Boddie, what is your middle name?

A. Julius.

Q. Are you the same Marvin Julius Boddie who was born on April 30, 1940?

A. Born on April 30th? That's correct.

Q. And also the same Marvin Julius Boddie who was convicted of larceny on May the 15th, 1964?

A. Yes, sir."

Appellant Lawson, on the evening in question, was in the area of the 1300 block of 18th Street, Northwest. He had just left the Manhattan Bar, between Church Street and P Street on 18th, where he had had a beer, leaving shortly after midnight. When he left the beer joint, he proceeded along 18th Street until he came to a parking lot (the Bank lot), and started into it to urinate. But he then decided against this, since the lot "comes out on both sides * * and I might have got * * caught by an officer. So I went a little farther, to this place that had a fence on it, you know, a low fence: and I leaped the fence and went to the back of it and urinated" (Tr. 261). On this evening, he was wearing blue pants, a light trench coat, and a Russian cap. He did not have occasion to be inside the Emerson Institute on this evening, nor in

its back yard, did not plan a burglary there, and did not know the Appellant Boddie (Tr. 266; 274).

Cross-examination of Appellant Lawson added only this (Tr. 275-276):

Q. Mr. Lawson, what is your middle name?

A. Thomas.

Q. Are you the same Doia Thomas Lawson who was born on March the 9th, 1945?

A. Yes, sir.

Q. And are you also the same Doia Thomas Lawson who was convicted of robbery on October the 25th, 1963?

A. Yes, sir."

Following arguments of Counsel, the Trial Judge gave his charge to the jury (Tr. 286-303). This charge was thoughtfully constructed, and as fair to one side as to the other, subject only to the reservation hereinafter expressed.

Convictions on all counts followed.

SUMMARY OF ARGUMENT

Under the circumstances of these cases, it was error to admit evidence of a prior criminal conviction of each Appellant. The Government marshalled an impressive

(albeit circumstantial) case against each Appellant and the Appellants, neither of whom was able to call any witness other than himself. were perforce required to take the stand. Added to the existing imbalance, the following impeachments insured the resulting convictions.

ARGUMENT

At the outset, it should be noted that Counsel is not unmindful of the ever present problem of identification testimony. A Stovall-type hearing (Stovall v. Denno, 388 U.S. 293 (1967); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967)), was held by the District Judge, as to the Appellant Boddie (Tr. 59-82), at which hearing Mr. Aldrin and Officer Galle testified at length. The Court stated that the question was whether the identification testimony of Mr. Aldrin could be received in evidence as not being tainted by suggestivity. Counsel for Appellant Boddie conceded, as perforce he was required to, that the confrontation was "immediate" (Tr. 30). And the District Court ruled (Tr. 80-81) that:

" * * you don't hold a lineup for a man who says 'There he is', right in -- at the scene.

I am going to deny your motion to suppress the identification by Mr. Aldrin under the Stovall rule. I think it's admissible. * *

Here I don't think we have * * suggestivity at all. * * Therefore, he can testify with respect to the identification of the defendant Boddie at the scene and also in-court identification here."

Authoritative on the question of on-the-scene identifications is the teaching of this Court in Russell v. United States, 408 F. 2d 1280, 133 U.S.App.D.C. 77, cert. den., 39 S. Ct. 1736 (1969). There, the witness, hearing the sound of breaking glass emanating from a store, and observing an individual emerging from the premises, reported the incident to the police three or four minutes after it occurred." A suspect was promptly apprehended in the vicinity, and was arrested and taken into the presence of the witness, who thereupon identified him. Thus, the Court had before it the question "whether the Wade rule applies to prompt confrontations with an eyewitness at the scene of the crime." The Court, per Bazelon, Ch. J., and Robinson, C. J., with Danaher, C. J., concurring, held that it does not.

The problem is inherently troublesome (cf. United States v. Kinnard, 294 F. Supp. 286 (D.C.D.C., 1968), reaching a contrary result as to a confrontation which occurred some 45 minutes after a robbery, and also Rivers v. United States, 400 F. 2d 935 (5th Cir., 1968), accord with Kinnard, where the confrontation apparently required

about one hour), but it may now be taken as established in our Circuit, that the Wade-Stovall-Gilbert rationale does not apply to "on-the-scene identifications which occur within minutes of the witnessed crime" (Russell v. United States, 403 F. 2d 1280, 1284, n. 20).

As noted, the District Court permitted the prosecutor to elicit from the Appellants the fact that they had each been previously convicted of a crime -- larceny, as to the Appellant Boddie, and robbery, as to the Appellant Lawson. Thus, the Luck problem (Luck v. United States, 348 F. 2d 763, 121 U.S.App.D.C. 151 (1965)) is with us.

It is submitted that, on balance, and under the totality of the circumstances of these cases, the net effect of this showing could but have been to establish that the Appellants were "bad" individuals, which is precisely the effect inveighed against by this Court in the Gordon decision (Gordon v. United States, 393 F. 2d 936, 940, 127 U.S.App.D.C. 343, 347 (1967)).

Here, the evidence against the Appellants was concededly circumstantial. Neither of them was actually apprehended while in possession of the fruits of the crime, nor positively identified as having been inside the main building of the Emerson Institute. Neither of them, however, produced - or, probably, could produce - witnesses on

their own behalf. And marshalled against them was an impressive array: two eyewitnesses (both lawyers), two police officers (also eyewitnesses), and two experts from the Federal Bureau of Investigation. Appearances on the stand by the Appellants were thus mandatory.

Counsel's point is that adding the evidence of the prior convictions to the affirmative imbalance which the Government had already managed to achieve simply sufficed, in the common expression, to "wrap it up". It can be said that where men are guilty, their guilt should be wrapped up; the problem, of course, is that it is not incumbent upon us to make this judgment; the duty falls, rather, to the jury.

So the question can be phrased: under all of the circumstances of these cases, did the ends of justice really require that some reference be made to the Appellants' prior records?

It cannot be gainsaid but that the District Court could have admitted more evidence of past misconduct on the part of these Appellants than he did (as to Appellant Lawson, in addition to the robbery conviction in 1963, evidence as to which was admitted, there was a conviction of housebreaking in 1964, which was excluded; as to the Appellant Boddie, in addition to the larceny conviction in

1964, evidence as to which was admitted, there were convictions for unlawful entry (2), petty larceny (2), and manslaughter, which were excluded (Tr. 234-235).

The problem, however, does not revolve around what the District Court excluded.

In Evans v. United States, 397 F. 2d 675 (D.C. Cir., 1968), the Appellant Evans was indicted for first degree murder, felony murder, and attempted robbery. The District Court permitted the introduction of his prior convictions for petty larceny and narcotics offenses. Appellant was convicted of felony murder and attempted robbery, and sentenced to life. This Court affirmed, Judge Bazelon dissenting.

In the majority opinion, Circuit Judge Burger (as he then was), remarked (397 F. 2d 678) that:

"It is dispositive of the present claim that, in order to demonstrate on appeal an abuse of discretion under Luck, it must be shown that the Appellant met his burden of demonstrating some affirmative reasons why the circumstances of his case were such as to make his [unimpeached] testimony particularly necessary. * * * The real issue is whether Appellant met the burden of showing a special need for the jury to hear his version of the events." [Emphasis supplied.]

It is submitted that, although the suggestion may not have been made to the District Court in so many precise words, each Appellant here possessed "a special need

for the jury to hear his version of the events, free from the countervailing - if not, in fact, nullifying - impact of the impeachment. As a very practical matter, Appellants' only demonstrable hope of securing acquittals lay in their taking the stand to defend themselves: if, owing to any extent to the attendant impeachment, this was foredoomed, the result is a kind of charade.

The essential unfairness of such a situation brings irresistibly to mind the eloquent comments of Circuit Judge McGowan, writing in Blakney v. United States, 397 F. 2d 648, 649-650 (1968), to the effect that:

"The circumstances of this case [which, on the Luck issue, were altogether remarkable] * * seem to me peculiarly to point up the dangers lurking in our statute * * The question * * is whether it [this type of impeachment] should continue further at least in the case of criminal defendants who wish to testify in their own defense. * *

These facts need only to be recited to suggest what the impact in this case [involving alleged narcotics violations] of the jury's knowledge of the robbery conviction might well have been. They speak more eloquently than words of the hollowness of the pretense that juries can and do heed the formal instruction that they must regard the prior criminal conviction as relevant only to Appellant's propensity to tell the truth rather than to commit crime."

It is, indeed, "an uphill road to travel" (Weaver v. United States, 408 F. 2d 1269, 1272 (1969)).

CONCLUSION

The judgments should be reversed and the cases remanded for a new trial.

Respectfully submitted,

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Washington, D. C., March 6, 1970

Certificate of Service

I hereby certify that a copy of the within Brief for Appellants was delivered this ____ day of March, 1970, to the Office of the United States Attorney, United States Court House, Washington, D. C.

RICHARD WHITTINGTON WHITLOCK

